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TORTS WITHOUT PARTICULAR NAMES.

The title of Book III, Bishop on Non-Contract Law, is—"Wrongs with Particular Names." The first twelve chapters of Book III (Chapters XIII to XXIV) are "each devoted to a wrong to which the law has given a name" (*e. g.*, Chapter XIII, "Assault and Battery"). Then follows Chapter XXV, on "Wrongs not Named;" wherein the author says¹ "If a wrongful act whereby one injures another has received no name, the consequence does not follow that it will be without redress." And he further says: ". . . the fact that we can find in our books no name for a wrong is not to any degree evidence that it is not actionable."²

For practical purposes the rights, the invasion of which will generally constitute a tort, may be divided into the "three elementary rights of civilized society—the right of personal liberty and security, the right of reputation, and the right of property."³ There is comparatively little difficulty in determining under which of these three main divisions a specific tort should be classified. And we find, under each large division, various subdivisions of specific classes of torts which are usually designated by distinct

¹Sec. 486.

²See also sec. 494.

³See Clerk & Lindsell on Torts, 6th ed. p. 4; Cave J. in *Allen v. Flood*, L. R. 1898, App. 1, p. 29; Sir F. Pollock, 14 *Encyclopaedia, Laws of England*, 2nd Ed. 139-140.

names. By "Wrongs not Named," Dr. Bishop means wrongs which do not fall under any of these sub-divisions which are now generally designated by particular names. He, in effect, asserts that the sub-classes of torts which are now spoken of by particular names, such as "Assault," "Battery," etc., do not include all actionable torts.

Similar views are held by other legal authors; who use a somewhat different phraseology. Thus Street says:⁴ "Particular torts, as trespasses of violence, defamation, nuisance, and the like, can be defined well enough, but the term 'tort' is also used to denote wrong in general. It includes the unclassified residuum as well as the specific definable wrongs." So Pollock says:⁵ "If we enumerate the known causes of action which have received names we cannot say that no action will lie outside these, or we can say it only with the warning that their borders may be extended." And in 35 *Law Quarterly Review*, p. 287, in a note to the recent decision in favor of the plaintiff in *Janvier vs. Sweeney*,⁶ the editor says: "Such a cause of action as we have in *Janvier vs. Sweeney* cannot be assigned to any of the old categories which were supposed to exhaust the law."

To understand how the present situation, as described by Bishop and Street, came to exist, we must look at the history of the law of torts, and consider the manner in which that law has gradually grown.

Originally, torts were classified according to the forms of action under which remedies were enforced; in effect, "a purely procedural classification."⁷ When, at a later day, the substantive law of torts began to receive attention, the courts did not commence by attempting to lay down a general definition of "tort" or to define the general scope of the term. They began to recognize the existence of various separate kinds of torts, which gradually came to be designated by conventional titles. In the first stage, there were

⁴Foundations of Legal Liability, Introduction, XXV-XXVI.

⁵Vol. 14, *Encyclopaedia, Laws of England*, 2nd ed., 135.

⁶*L. R.* (1919) 2 K. B. 316.

⁷See Bohlen, *Cases on Torts*, Ed. of 1915, Preface, III.

rules relating to each form of action; but no substantive law of torts. Next, there were recognized a number of rules of substantive law about various kinds of torts, which had come to be known by separate names; these rules not being entirely consistent with each other. At last, in the nineteenth century, there began attempts to frame a complete theory of torts, and to define the scope of the general term.⁸ These attempts have progressed slowly and unsatisfactorily. The various definitions proposed have met with much criticism.⁹ As might have been expected, it has been found that the various kinds of torts which have received specific names do not include all the wrongs which courts are accustomed to recognize as coming under the general head of torts. Hence the admission that, besides wrongs with particular names, there are "wrongs without names"¹⁰ ("in-nominate grievances,") which are subjects of action, and for which damages are recoverable.

At the present time, Holland says:¹¹ "Wrongful acts may be, and are, classified on five different principles at least; . . . III. According to the means whereby the wrong is effected, whether, for instance, by physical violence, by words uttered, . . . V. According to the nature of the right invoked, whether, for instance, it be a right to personal freedom . . . "

The learned author prefers the fifth principle of division.¹²

Pollock says:¹³ "The classification of actionable wrongs is perplexing, not because it is difficult to find a scheme of division, but because it is easier to find many, than to adhere to any one of them." Indeed, consistent adherence

⁸"The really scientific treatment of principles begins only with the decisions of the last fifty years . . .". Pollock, Introduction to first edition of his work on Torts, in 1886; page vii.

⁹See Note, 30 Harvard Law Rev. 247 *et seq.*

¹⁰See 26 Law Quart. Rev. 164.

¹¹See Jurisprudence, 8th Ed., 291-292.

¹²In 30 Harv. Law Rev. 241 *et seq.*, it is suggested that the cases now usually grouped under the head of torts can be divided into two classes: (1) where there is fault: (2) where the court imposes absolute liability in the absence of fault.

¹³27 Encycl. Brit. 11th Ed., 65.

to one system may almost be said to be the exception rather than the rule. Holland¹⁴ speaks of "writers who waver between these various points of view, subdividing one portion of the whole class of wrongful acts upon one principle and another portion upon another principle." Some so-called specific torts are named according to the nature of the right affected or the harm done; while others are named by the same writer according to the method or manner by which the harm is done.¹⁵

As to the existence of unnamed wrongs outside of (in addition to) wrongs which are now generally designated by particular names; consider the large division of Rights of Personal Immunity (personal liberty and security). That such unnamed wrongs exist is assumed in the enumeration of Particular or Specific torts in Jenks' Digest of English Civil Law.¹⁶

"Section IV. Torts in respect of the Person.

Title I. Trespass to the Person.

Sub-Title A. Assault and Battery.

Sub-Title B. False Imprisonment.

Title II. Other Injuries in respect of the Person."

It is now proposed to give some instances where an action of tort is held maintainable for conduct which does not come under any specific class of torts designated by a particular name.

Take, for illustration, the large division of rights of personal immunity.¹⁷ There are two specific classes of

¹⁴Jurisprudence 8th ed. p. 291-2.

¹⁵The common custom of enumerating "Negligence" among specific torts is criticised as follows in Jenk's Digest of English Civil Law, Book 2, Part 3 continued, p. 545-6:

"So far from being a specific tort, negligence in itself is not a tort at all, but is merely one of the commonest grounds of liability in specific torts. . . . The treatment of negligence as a special kind of tort is . . . a survival of a classification of torts based on the forms of action—a classification which has now disappeared in favor of a division based mainly on the nature of the interest effected; and negligence has no logical place among torts divided into such classes as torts in respect of Property, the Person, the Reputation, and the like." Compare 26 Law Quarterly Review, 159.

¹⁶Book 2, Part 3 Continued, pp. 431, 439, 445.

¹⁷This might include not only personal security from harm, but also personal liberty. We are now considering only the former.

violation of this right which are designated by particular names: *viz.*, assault and battery. Upon a superficial reading of some good text-books one might suppose that all actionable violations of the right of personal security are comprised under these two terms; and that violations, which do not constitute either assault or battery, are not actionable. Yet there are decisions, made by courts of excellent standing and unquestionably correct, where a plaintiff is allowed to recover in an action of tort for violation of personal security by conduct which is neither assault nor battery.

Two conspicuous examples are afforded by the decisions in *Wilkinson vs. Downton*,¹⁸ and in *Janvier v. Sweeney*,¹⁹ compared with the usual definitions of assault and battery.

Assault may be defined as involving the following requisites:

Physical force, unjustifiably put in motion by defendant, with intent to create, and actually creating, in plaintiff, a reasonable apprehension of immediate unpermitted (physical) contact with himself, either of a hostile nature or likely to result in bodily harm to himself (but not resulting in actual contact.)

As to battery; all definitions include the element of contact; unpermitted contact.

We should define battery as including two classes; *viz.*: (1) The intentional, unpermitted, application of force to the person of plaintiff in a hostile or rude manner, even though not causing bodily damage. (2) The negligent, unpermitted application of force to the person of plaintiff, if causing bodily damage. Some jurists would not include (2) as coming under the specific name of battery; but they would admit that negligent, damaging contact constitutes an actionable tort.²⁰

¹⁸L. R. (1897), 2 Q. B. 57.

¹⁹L. R. (1919), 2 K. B. 316.

²⁰See Cooley on Torts, 2nd ed. 186. As tending to sustain our definition; see Jenks, Digest of English Civil Law; Book 2, Part 3 Continued, section 896; Bigelow on Torts, 7th ed. 370, 374; Bishop, Non-Contract Law, sec. 190.

Wilkinson vs. Downton, was an action tried by jury before WRIGHT, J. and, after verdict, reserved for further consideration.

Defendant, in the execution of what he seems to have regarded as a practical joke, falsely represented to the plaintiff that her husband had met with an accident, had both legs broken, and had sent for plaintiff to bring him home. The effect of the defendant's statement, which plaintiff believed, was a violent shock to her nervous system producing serious illness. The jury gave a verdict for plaintiff including, besides other damages, the sum of 100£., the greatest part of which was given as compensation for the plaintiff's illness and suffering. WRIGHT J. upon further consideration, gave judgment for the entire amount of damage assessed.

The result is now generally admitted to be correct. But the tort was neither battery nor assault. It was not battery for that involves contact (or impact) which did not exist here. It was not assault; for (1st) as to defendant's conduct; there was no force put in motion towards plaintiff, no act other than speech, no intent to create in plaintiff a fear of contact with herself; and (2nd) as to the effect produced on plaintiff, there was no fear on her part of contact with her own person, no fear of any bodily harm to herself.²¹

WRIGHT J. does not base his decision (as to the item of 100£) upon the ground of fraudulent representation within the principle established in the leading case of *Pasley vs. Freeman*.²² His *ratio decidendi* is stated broadly as follows: "The defendant has . . . wilfully done an act calculated to cause physical harm to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This willful injurious act is in law malicious, although no malicious pur-

²¹Prof. Ames, in note to this case, 1 Ames & Smith's Cases on Torts, Ed. 1910, p. 13, note 2, correctly says it is not a case of assault.

²²1789, 3 Term R 51.

pose to cause the harm which was caused nor any motive of spite is imputed to the defendant."

As we have seen, the facts in this case do not constitute the specific tort which goes by the name of battery or assault. Neither do these facts bring the case within the specific kind of tort known as defamation, or that which is known *in law* as deceit. There was no defamatory charge effecting the reputation of either plaintiff or her husband. There *was* deceit, in the popular meaning of that term. But in law a narrower meaning is given to it. The action for deceit is maintained only in cases where plaintiff has been induced by defendant's falsehood (uttered by defendant to plaintiff) to voluntarily change his position and thereby has incurred damage.²³ Here the plaintiff's illness was involuntary.

The decision in *Wilkinson vs. Downton* was fully affirmed by the Court of Appeal in the recent case of *Janvier vs. Sweeney*,²⁴ The defendants in the latter case were private detectives, who wished to inspect certain letters, to which they believed that plaintiff, a maid servant, had means of access. In order to induce her to show the letters, they made to her false statements and threats. One of the defendants told plaintiff: "I am a detective inspector from Scotland Yard, and represent the military authorities. You are the woman we want, as you have been corresponding with a German spy." Plaintiff alleged that in consequence of the statements made to her, she sustained a severe nervous shock, became incapacitated from following her employment, and suffered from neurasthenia, shingles, and other ailments. The jury found (*inter alia*);

(3) "That the statements, or some of them, were calculated to cause physical injury to the plaintiff."

(4) "That the statements, or some of them, were made maliciously, that is, with the knowledge that they were likely to cause such injury."

(5) "That the illness from which the plaintiff suffered was caused by the utterance of the statements or some of them."

²³See Salmond on Torts, 4th Ed. p. 494 p. 504.

²⁴L. R. (1919), 2 K. B. 316.

Verdict for plaintiff, 250£. Judgment for plaintiff. An appeal by defendant was dismissed by the Court of Appeal.

The first paragraph in the head note is as follows: "False words and threats calculated to cause, uttered with the knowledge that they are likely to cause, and actually causing physical injury to the person to whom they are uttered, are actionable."

Here, as in *Wilkinson vs. Downton*, there was no ground for alleging that there was the specific tort of either battery or assault. As to battery; there was no contact. As to assault; there was no force put in motion; and, even if words alone could ever be sufficient and if the words here could be understood as evincing an intent to procure an arrest in future, yet they did not evince an intent to immediately arrest.

A valuable note upon this case in 35 *Law Quarterly Review*, for Oct., 1919, p. 287, *et seq.*, is as follows:

"Illness caused by sudden alarm or other painful emotion is as capable of proof and of being estimated in damages as any other kind of injury. Fright or 'nervous shock' may be a natural and probable result, not only of immediate fear of bodily harm, but of the impression conveyed by spoken words. If, therefore, threatening words are used for the purpose of unlawful intimidation and coercion, or a false statement is wilfully made for the purpose of giving pain, and their effect on the person to whom they are addressed is to produce physical injury, we have the complete connection of an act calculated to do harm and done without justification or excuse and temporal damage consequent thereon, and there is no reason for denying a cause of action to the sufferer. This doctrine is finally established, we think, by the decision of the Court of Appeal in *Janvier vs. Sweeney*, (1919) 2 K. B. 316, confirming *Wilkinson vs. Downton* and *Dulieu vs. White*, both well considered cases, as against the opinion of the Judicial Committee in *Victorian Railways Commissioners vs. Coultas*, 13 App. Cases, 222, and a minority of judgments in other jurisdictions which have taken the same line. It will be observed that the Court of Appeal did not think it necessary to call on counsel for the plaintiff. That being so, the chance of the House of Lords overruling their judgment may be neglected.

"The grain of truth in the contrary opinion is that a state of mind such as fear or grief is not of itself a tangible cause of

action.²⁵ The conclusion that bodily suffering consequent upon it is necessarily too remote to be actionable was hasty and illegitimate. Although this result is well within the lines of fairly old authority, it increases to our mind, the difficulty of maintaining the view quite lately held by some very learned persons, that the Common Law does not recognize any general duty not to do harm to one's neighbor without justification or excuse. Such a cause of action as we have in *Janvier vs. Sweeney* cannot be assigned to any of the old categories which were supposed to exhaust the law. It has nothing to do with defamation, and it was settled long ago (though not always) that words cannot amount to an assault. Neither is it analogous to any form of trespass or nuisance, for no right of property is affected. A living human body is not property. What is the action then? An innominate action on the case? But then, what conjunction of harmful intention or recklessness with consequent damage can be formally excluded? The supposed miscellaneous category is not really a supplement but involves a principle covering the whole ground. After all, *alterum non laedere* is a very old precept, though the Romans never worked it out."²⁶

In the preceding cases, the defendant's act, causing the fright and the consequent physical suffering, was a deliberate and willful wrong; and there was an intent to do some harm though not so great or extensive as that which actually resulted. How if the defendant's act, resulting in fright and consequent physical suffering is due, not to intention, but to negligence on the part of the defendant? Here there is a conflict of authority. Professor Bohlen, writing in 1902²⁷ says: "Perhaps upon no question presented within recent years has there been so much conflict in the decisions of courts of the highest authority, as upon that of the right to recover for negligence which causes no direct physical impact, but where an appreciable physical injury ensues in consequence of a fright or nervous shock produced thereby."²⁸

Of course, there may be an action of assault where plaintiff's reasonable fear of immediate hostile or damaging contact is intentionally created by defendant's *acts*—unlawful use of force—.

²⁶See 68 U. of P. Law Review, 176-179, note endorsing decision in *Janvier v. Sweeney*.

²⁷41 Amer. Law Register N. S. p. 141.

²⁸Prof. Bohlen sums up the then existing authorities as follows:

"A recovery has been allowed by the Court of King's Bench in England, *Dulieu v. White*, L. R., 1901, 2 K B. 669; Exchequer in Ireland, *Bell v. R. R.*, L. R., 26 Irish Rep. 428, 1890; and the Supreme Courts of Texas, *R. R. Co. v. Hayter*, 93 Texas, 243, (1900) Minnesota, *Purcell v. R. R.*, 48 Minn. 134, (1892);

It would be foreign to the purpose of this paper to enter now into a discussion of the above disputed point. We are here attempting to deal only with the cases where the facts (apart from the absence of a particular name) are admittedly sufficient to sustain an action of tort. We are not considering cases where the existence of an actionable tort is a matter in dispute.

As to the conflicting cases just cited in the notes, we are concerned here only to note three points:

1. If there is held to be an actionable wrong, it is one which cannot be classed under the specific name of either assault or battery. It is not assault, because there is no intention to cause fright or contact. It is not battery, because there is no physical impact or contact.²⁸

2. The authorities which allow an action evidently do not regard the existence (or presence) of a particular name as an essential prerequisite.

3. The authorities which deny a recovery do not generally consider the absence of a particular name as a sole sufficient objection to the maintenance of the action. The judicial opinion which we regard as the ablest of those opposed to recovery (that of ALLEN, J., in *Spade v. R. R.*) practically asserts that there is only one strong argument

and South Carolina, *Mack v. R. R.*, 29 So. 905, (1898); and see *dictum* in *Cal. Noum v. R. R.*, 111 Cal. 669, (1896)."

"A recovery has been denied by the Privy Council, England, *Coultas v. R. R.*, L. R. 13 App. Cases, 222, (1888); and the Supreme Courts of New York, *Mitchell v. R. R.*, 151 N. Y. 107, (1897); Pennsylvania, *Ewing v. R. R.*, 147 Pa. 40, (1892); and Massachusetts, *Spade v. R. R.*, 168 Mass. 285, (1897); and *dictum*, *Braun v. Craven*, 175 Ill. 403, (1899)."

The conflict of authority continues.

For collection of later cases on both sides, see elaborate notes in 3 L. R. A. N. S. 29; 22 L. R. A. N. S. 1073; L. R. Ann. 1915 D. 830.

Two of the ablest arguments in favor of recovery are found in the articles by Prof. Bohlen, in 41 Am. Law Register, N. S. 141; which Prof. Ames calls "excellent" (1 Ames & Smith's Cases on Torts, Ed. 1910, p. 28, note 1); and in the discussion by the writer of the note in 3 L. R. A. N. S. p. 29 *et seq.*

The opinion of Judge Allen, in *Spade v. Lynn & Boston R. R.*, 168 Mass. 285, (1897), is, we think, the ablest presentation of the case against recovery.

²⁸In defining battery, *ante*, we have said that some jurists would refuse to call non-hostile contact a "battery," but might apply to it some such specific name as "negligent, damaging, contact." But neither term would include the present supposed case where there is no contact, either hostile or damaging.

against recovery; and that argument does not consist in the lack of a specific particular name for the alleged tort.

In Chapter XXV of Bishop on Non-Contract Law, the author enumerates various instances where an action of tort is held maintainable for conduct which does not come under any specific class of torts which is commonly designated by a particular name. One instance is as follows:

"Sect. 488. Suing without authority.—If one brings a suit against another in the name of a third person who has not authorized it, he is answerable to the other in damages, though he acts without malice, so that the wrong is not malicious prosecution. It is simply a thing done unauthorized by law, wherefrom the complaining person has suffered."

The person so bringing the suit is liable, although he mistakenly supposed himself authorized to sue in the name of the third person, and although he was not actuated by any improper motive, and although there was a good cause of action in favor of the third person who was named as plaintiff. His good faith, and his honest belief (even on reasonable grounds) that he has authority, does not save him. He acted at his peril when he used the name of another person in instituting suit. He is absolutely liable if he did not have authority.²⁹

This differs from the specific tort, generally known by the name of malicious prosecution, or malicious institution of a civil suit. Here the plaintiff must prove wrong motive (*alias* malice,) and want of probable cause. Here proof of these facts is not essential to the maintenance of the action (although the damages might be enhanced by showing them). The gist of the action is the want of authority.

Again, the tort here differs from the specific tort designated by the name "abuse of lawful process." There, process lawfully issued is improperly used to effect an object not within its proper scope; *e. g.*, to compel the defendant

²⁹Bond v. Chapin, 1844, 8 Metcalf, 31; Foster v. Dow, 1849, 29 Maine, 442; Moulton v. Lowe, 1851, 32 Maine, 466; Bigelow, J., in Smith v. Hyndman, 1852, 10 Cushing, 554; 3 Sedgwick on Damages, 9th ed. s. 839.

to give up possession of a document, not the legal object of the process.³⁰ Here, there never was lawful process. The writ was unlawful *ab initio*.

In a case like *James Bond v. Chapin*,³¹ recovery is not based on a fiction contract, as in *Collen v. Wright*,³² and *Starkey v. Bank of England*.³³ Chapin, when bringing suit in the name of Thomas Bond against James Bond, made no representation to James Bond, whereby James Bond was induced to enter into a transaction. He is not now held liable *in contract* on the fiction ground that he impliedly warranted that he had authority to sue in the name of Thomas Bond. He is now held liable *in tort* for suing in the name of Thomas Bond without authority.

Instead of classifying wrongs by the nature of the right invaded, they may be distinguished according to the nature of the instrument or method whereby the harm is inflicted.³⁴ One prominent method of inflicting harm is by the use of language, written or oral.³⁵

The use of language, under special circumstances, may, as we have seen, constitute a method of damaging the right of personal immunity. It is the most common (if not practically the only) method of inflicting damage upon (of violating) the right to reputation. It also constitutes one method of damaging (violating) the right of property.

Under the general title of Harm done by the Use of Language, there are two classes (or subdivisions) of specific

³⁰Pound, 652-3, and notes; Ames & Smith Cases, Ed. 1910, 616, note; Clerk & Lindsell on Torts, 2nd ed. 578-9.

³¹8 Metcalf 31, 1844.

³²1857, 8 El. & Bl. 647.

³³L. R. 1903, App. Cases, 114.

³⁴See Innes, Principles of Torts, Preface V to VII; Holland on Jurisprudence, 8th Ed., 291-292.

³⁵Before proceeding to discuss attempts to classify injuries inflicted by the use of language, it seems proper to call attention to the opinion of a very acute lawyer—that such injuries do not admit of classification for any useful purpose. In 6 Amer. Law Review, p. 612, Mr. N. St. John Green, speaking of the second edition of Townsend on Slander and Libel, says: "Mr. Townsend has an introductory chapter upon language as a means of effecting injury. We do not think injuries done by means of language can be classified together for any useful purpose. . . . We are sorry to see so much learning and talent and patient research expended in an attempt to classify under general principles a branch of the law which in our opinion does not admit of such classification."

torts, commonly designated by particular names, *viz.*, Defamation (divided into Libel and Slander), and Deceit.³⁶ But, although these two sub-divisions stand out prominently and might be supposed to comprise the only torts under that general head which are called by particular names, yet they confessedly do not include all actionable torts falling under the general description of harm done by the use of language. A striking proof of this proposition is found by comparing the legal meaning of Defamation and Deceit with the facts in the leading case of *Ratcliffe v. Evans*.³⁷

Defamation consists in the publication to third persons of a false and defamatory statement respecting another person (plaintiff in an action). A defamatory statement is one which has a tendency to injure the reputation of the person to whom it refers; which tends "to diminish the good opinion that other people have of him."

The wrong of Deceit (the foundation of an action for Deceit) is defined in law, in "a narrow and specific sense," as consisting in the wrong of misleading the plaintiff, so that he causes harm to himself by his own mistaken act. In other words it consists "in false statements made to the plaintiff himself, whereby he is induced to act to his own loss."³⁸

³⁶Attempts have been made to establish, or recognize, particular names for other torts under this general head. To some of these attempts we shall refer later.

³⁷*L. R.* (1892), 2 *Q. B.* 524.

³⁸See *Salmond on Torts*, 4th ed. pp. 494, 509. *Bower on Actionable Misrepresentation*, sec. 453.

"Wrongs of fraud or misrepresentation are of two kinds, essentially distinct: (a) The wrong of deceiving the plaintiff, so that he causes harm to himself by his own mistaken act; (b) The wrong of deceiving other persons, so that they by their mistaken acts cause harm to the plaintiff. The first of these injuries may be called, in a narrow and specific sense of the term, the wrong of Deceit; the second has no recognized distinctive title, and in default of a better designation it will here be called the wrong of Injurious Falsehood." *Salmond, Torts*, 4th ed. p. 494. Compare *Bower on Actionable Misrepresentation*, sec. 453.

* * * * *

"The wrong of deceit consists, as we have seen, in false statements made to the plaintiff himself, whereby he is induced to act to his own loss. The wrong of injurious falsehood, on the other hand, consists in false statements made to other persons concerning the plaintiff, whereby he suffers loss through the action of those others. The one consists in misrepresentations made to the plaintiff, the other in misrepresentations made concerning him. *Salmond, Torts*, 4th ed. p. 504.

Now consider the case of *Ratcliffe v. Evans*.³⁹ The plaintiff alleged that he had for many years, at a certain place, carried on the business of an engineer and boiler-maker, under the name of "Ratcliffe & Sons;" and that he had suffered damage by the defendant falsely and maliciously publishing, in his newspaper, words importing "that the plaintiff had ceased to carry on his business of engineer and boiler-maker, and that the firm of Ratcliffe & Sons did not then exist."

At the trial, plaintiff proved the publication of the statements complained of, and that they were untrue. He also proved a general loss of business since the publication. In answer to questions left to them, the jury found "that the words did not reflect upon the plaintiff's character, and were not libellous; that the statement that the firm of Ratcliffe & Sons was extinct was not published *bona fide*; and that the plaintiff's business suffered injury to the extent of £120 from the publication of that statement."

The Commissioner of Assize gave judgement for plaintiff for £120; and an appeal from his judgment was dismissed by the Court of Appeal (Lord Esher M. R., Bowen and Fry L. J. J.).

The Court rightly held that there was here an actionable wrong; but it was not the wrong designated by the specific legal name of Deceit or Defamation.

It was not Deceit, within the legal meaning of that term. The statement, though consciously false, was not made to the plaintiff himself, nor was the plaintiff thereby induced to himself take any action. He did not suffer loss on account of any act of his own induced by his own mistaken reliance on the defendant's statement.⁴⁰

As to Defamation, the opinion is explicit to the point that this statement was not defamatory.

Bowen, L. J. "It was treated in the pleadings as a defamatory statement or libel; but this suggestion was

³⁹L. R. (1892) 2 Q. B. 524.

⁴⁰See Salmond on Torts, 4th Ed. pp. 494, 504.

negatived, and the verdict of the jury proceeded upon the view that the writing was a false statement purposely made about the manufactures of the plaintiff, which was intended to, and did in fact, cause him damage."⁴¹

* * * * *

"That an action will lie for written or oral falsehoods, not actionable *per se* nor even defamatory, where they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title."⁴²

Further on, ⁴³ Bowen L. J. speaks of the present action as: "brought for a malicious falsehood intentionally published in a newspaper about the plaintiff's business—a falsehood which is not actionable as a personal libel, and which is not defamatory in itself—"⁴⁴

If, under the general head of Harm by the Use of Language, Deceit and Defamation are to be considered the only classes of specific torts designated by particular names, the result will be that a large number of torts, of frequent occurrence, must be treated as torts without particular names; and some of these are torts which, in popular speech, would be classed under Deceit, though they do not fall within the narrow definition which the law has affixed to that term. Very naturally, jurists have attempted to establish, or recognize, particular names for other groups of torts coming under the general head of Harm by the Use of Language. Some names would have a wide scope. Other names are used to describe what have been called "specialized varieties" of harm thus caused.

⁴¹p. 527.

⁴²p. 527.

⁴³p. 529.

⁴⁴A plaintiff does not necessarily fail to maintain his action because the language is non-defamatory but he is obliged to prove his case much more fully. Certain points whose existence is "presumed" in a case of defamation are required to be proved if the language is non-defamatory. This is clearly brought out in Odgers on Libel and Slander, 5th ed. 77, in the chapter entitled: "Actions on the Case for Words which cause Damage."

Two suggested names, intended to cover a very large number of torts are: "Injurious Falsehood" suggested by Mr. Salmond,⁴⁵ and "Malicious Language."

Both these terms seem to us objectionable. Both are expressed in ambiguous phrase; and their adoption (the adoption of this nomenclature) will lead to disputes as to the meaning intended to be conveyed thereby (annexed thereto).

As to "Injurious Falsehood." "Falsehood," as well as other terms derived from the root "False," is used in two very different significations. It may mean conscious falsity on the part of the utterer: *i. e.*, that a statement is not believed to be true by the one who utters it. Or it may mean only that it is not true in point of fact; although the utterer honestly believed it to be correct, and may even have had reasonable ground for his belief.⁴⁶

"Injurious" is also a word used in more than one meaning. "Injury" in its literal signification, as a compound of the two Latin words *in* and *jus*, means against law, unlawful, an infringement of a legal right. But "injury" is frequently used as synonymous with "damage;" thereby causing much confusion.⁴⁷

If, in the proposed name, "injurious" is used in the sense of "unlawful," there is nothing to show when, or why, a falsehood should be regarded as unlawful.⁴⁸ If the word "injurious" is intended to be used in the sense of "damaging," it would be better to substitute the latter term.

The name "Malicious Language" is not less objectionable than "Injurious Falsehood." The use of the word "Malice," and its derivatives, has introduced more confusion into the law than another word.⁴⁹ It is frequently

⁴⁵See Salmond, *Torts*, 4th ed. pp. 494, 504.

⁴⁶See Bower on Actionable Misrepresentation, sec. 468.

⁴⁷See 17 *Columbia Law Review*, 386-387; especially citations in page 387, note 20.

⁴⁸All untrue statements are not actionable. See Markby, *Elements of Law*, 3rd ed., sec. 701, 702.

⁴⁹See L. C. Krauthoff, 21 *Reports Am. Bar Association*, 335, 338.

used in the sense of "malice in law," or "legal malice." When so used it is a pure fiction; introduced into the law by the invention of one fiction and got out again by the invention of another fiction.⁵⁰ When used to indicate a reality, it has various meanings quite diverse from each other.⁵¹ Many eminent lawyers avoid its use when possible, and would be glad to have the term omitted from the law.⁵²

This might seem the proper place to consider all other attempts to establish particular names for groups of torts

⁵⁰See Mr. Green, 6 Am. Law Rev. 609-610; 1 Street, Foundations of Legal Liability, 317; Gaynor J., 1896, in Prince v. Brooklyn Daily Eagle, 16 New York Miscellaneous, 186, 188; Odgers, Outline of the Law of Libel, 112-116.

⁵¹"The word (or its derivatives) is sometimes used to denote morally wrong intent or morally wrong motive; or an act done intentionally without legal justification or excuse, though without any moral fault; or merely a defendant's knowledge of a particular fact." See 60 University of Pennsylvania Law Review, 368, note 5.

⁵²" . . . it is submitted that the less use we make of it the better." Pollock, Torts, 6th ed., 272.

In 14 Law Quarterly Review, 132, speaking of the discussion of principles in a recent case, Sir Frederick Pollock said: "May we hope that, so far as civil actions are concerned, it will enable us to get rid of the perplexed and perplexing word 'malice' altogether."

In South Wales Miners' Federation v. Glamorgan Coal Co., L. R., (1905) A. C. 239, 255; Lord Lindley said: " . . . it conduces to clearness in discussing such cases as these to drop the word 'malice' altogether and to substitute for it the meaning which is really intended to be conveyed by it."

In 18 Harv. Law Rev. 422, note 1, Prof. Ames said: "If so 'slippery' a word, to borrow Lord Bower's adjective, were eliminated from legal arguments and opinions, only good would result."

Compare also statements and quotations in articles by present writers: 60 Univ. Pa. Law Review, 368-371; 462-467; 13 Columbia Law Review, 22-23; 27 Yale Law Journal, 162-163.

⁵³The *dicta* in the House of Lords, in Derry v. Peek, 1889, L. R. 14 App. Cases, 337, are regarded in England as establishing the rule of non-liability for negligent language. This rule is regarded by some eminent English jurists as intrinsically unjust, and is not adopted in various parts of the United States. See authorities collected and commented upon in an article by the present writer in 14 Harv. Law Rev. 184; contending that there is, under certain conditions, liability for negligent language; in other words, that "the law, as distinguished from contract, does sometimes impose a duty to take reasonable care to tell the truth."

If the latter view should become generally adopted, and is to govern in matters of classification and nomenclature, the courts will recognize and designate by special names more than one class of misstatements "other than Defamation and Deceit." There would be, at least, two special classes, which can be described roughly as follows:

1. Where the defendant did not honestly believe his statement.
2. Where the defendant honestly believed his statement but was under a duty to use care to ascertain the truth and neglected that duty.

In other words: (1) Consciously false misstatements, resulting in damage. (2) Negligent misstatements, resulting in damage.

It would, of course, be desirable (if possible) to frame the name of the second class in such a way as to indicate when a duty to use care exists. As to this, see suggestions in 14 Harv. Law Rev., p. 188, p. 195-6.

coming under the general head of "Harm by the Use of Language other than Defamation or Deceit;" and confined to cases where the defendant's conduct is a foundation for an action of tort to recover damages. But the full consideration of this question does not fall within the limited scope of the present paper. The object (purpose) of this paper, as stated on an earlier page, is to consider only those questions of classification and nomenclature which arise as to points upon which the substantive law of torts is settled; in other words, as to cases in regard to which it is now generally admitted that an action of tort would lie. As previously stated in regard to an earlier topic, we are not now attempting to settle disputed points as to the substantive law of torts.

Hence we do not here attempt to discuss the disputed point as to whether there is liability (and, if so, under what limitations or restrictions) for negligent use of language; in other words, whether there is ever a legal duty, except when created by contract, to be careful in the use of language. And it follows that we do not now consider how the existence of such liability or duty would affect questions of classification and nomenclature.⁵³

Thus far, we have been dealing in a fragmentary way with a few specific instances and illustrations under the general topic of this paper. It is now desirable to take a broader view of the subject.

What proportion of torts have particular names? It has been said that "most wrongs have no special names."⁵⁴ There is a sense in which the statement is true, but another sense in which it is not true. The first twelve chapters (Chapters XIII to XXIV) of Book III, Bishop on Non-Contract Law, are "each devoted to a wrong to which the law has given a name." Then follows Chapter XXV on

⁵⁴"Most wrongs have no special names. But certain of the more common wrongs, such as trespass or conversion, are distinguished by names. These should be defined, *i. e.*, in the case of each it should be pointed out what particular combination of the elements that are essential to any wrong are elements in the particular wrong in question." Prof. H. T. Terry, 17 *Columbia Law Review*, 380; and see Bishop non-Contract Law, sec. 494.

"Wrongs not Named," of which the author gives various distinct examples. If each "Unnamed Tort" that can be found is regarded as constituting in itself a separate variety of tort, then the number of these separate varieties may, in the aggregate, largely exceed the number of specific classes to which the law has given particular names. But the number of cases included in the specific classes which have particular names will probably largely exceed the number of cases included in the unnamed varieties. Take, for instance, 1300 litigated cases of torts on the docket of a common law court. Suppose that 1200 of these cases are included in twelve specific classes which are designated by particular names. Suppose that each of the remaining 100 cases differ essentially from each other, and thus constitute 100 distinct varieties of "Unnamed Torts." Here, *ex hypothesi*, we should have more varieties of "Unnamed Torts" than of specific classes of torts bearing particular names; there being in fact 100 of the former and only 12 of the latter. But there would be 1200 cases included in the 12 classes having particular names, while only 100 cases would be included in the 100 different varieties of "Unnamed Torts."

Upon what principle, with what aim, should cases be classified as having particular names, or as belonging to "Unnamed Torts?" In adopting particular names, what dangers are to be avoided?

As opposite extremes to be avoided, we may speak, on one hand, of names that are too broad or vague; names that are so general that they would include almost everything, in fact including utterly incongruous elements. And, on the other hand, we may speak of names that are too minute, the mistake of over-division.

It is neither practicable nor useful to establish a distinct name for every possible concrete case of tort. This difficulty, in another form, confronts jurists who favor codification. They admit that it may be inexpedient to state general principles without adding any subsidiary rules. But

they believe it undesirable to attempt to add subsidiary rules sufficiently numerous and minute to point out unerringly the exact decision in every conceivable concrete case. Sub-rules, stated with this purpose, "would be very complicated, full of fine distinctions and hard to apply in practice."⁵⁵

As an example of a name that is too broad, too general, we may instance the term "Private Nuisance." This term has been severely criticized. Witness the following statements:

Judge Cooley⁵⁶ says: "It is very seldom indeed, that even a definition of nuisance has been attempted, for the reason that, to make it sufficiently comprehensive, it is necessary to make it so general it is likely to define nothing."

Mr. Garrett⁵⁷ says: "It is indeed impossible, having regard to the wide range of subject-matter embraced under the term nuisance, to frame any general definition, . . ."

Pollock, C. B., in a dissenting opinion,⁵⁸ says: "I do not think that the nuisance for which an action will lie is capable of any legal definition which will be applicable to all cases and useful in deciding them."⁵⁹

Prof. E. R. Thayer⁶⁰ says of nuisance: "It is so comprehensive a term, and its content is so heterogeneous, that it

⁵⁵See Terry, *Leading Principles of Anglo-American Law*, s. 581, s. 610; 2 Austin, *Jurisprudence*, 3d ed. 687. See also article by present writer, 25 *Harv. Law Rev.* 315.

⁵⁶*Torts*, 2d ed., 672.

⁵⁷*Nuisances*, 3d ed. p. 4.

⁵⁸3 *Best & Smith*, p. 79.

⁵⁹As an example of attempts to frame a definition of private nuisance, we may start with Blackstone, and then amend his statement by additions from Stephen and Cooley.

"A private nuisance is defined to be anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another." 3 *Blackstone Com.* 216. Blackstone's definition is amended in 3 *Stephen's Com.*, 1st ed., 499, by adding—"and not amounting to a trespass." This is further amended by Cooley (*Torts*, 2d ed. 670) by inserting the word "wrongfully" between "anything" and "done," so that the twice amended statement will now read—"A private nuisance is defined to be anything wrongfully done to the hurt or annoyance of the lands, tenements, or hereditaments of another, and not amounting to a trespass."

Jenks' definition of Nuisance (*Digest of English Civil Law*, Book 2, Part 3, p. 391) contains the statement: "The fact that such an annoyance, prejudice or disturbance legally amounts to trespass, is no bar to an action of Nuisance."

As to the distinction between nuisance and trespass, see *Salmond on Torts*, 4th ed., 213.

scarcely does more than state a legal conclusion that for one or another of widely varying reasons the thing stigmatized as a nuisance violates the rights of others."

Judge Innes⁶¹ says: "Nuisances comprise a group of miscellaneous torts, properly classifiable under several of the principal classes of torts."

Dr. Bishop⁶² says: ". . . many wrongs are indifferently termed nuisance or something else, at the convenience or whim of the writer. Thus, injuries to ways, to private lands, various injuries through negligence, wrongs harmful to the physical health, disturbances of the peace, and numberless other things are often or commonly spoken of as nuisances while equally they are called by the other name, and the other name may include other things also which are not nuisances."

The term "nuisance," when used to denote an actionable tort, does not explain the reason for actionability. The wrongs classed under the general head of nuisance "are breaches of various duties."

Prof. Terry⁶³ says: "The word nuisance in this sense, therefore, does not stand for any conception which enters as an element into the definition of the wrong and which needs to be itself separately described as one of the *praecognoscenda* of the definition, but is a name for the wrong itself. Its only use is as a term of classification applied to a group into which certain wrongs are gathered for convenience of reference."⁶⁴

Mr. Salmond⁶⁵ says: "Public and private nuisances are not in reality of the same genus at all. . . . Private nuisances are themselves of two kinds Here, again, it does not seem possible to include these two kinds of nuisances within any single definition. They are not in

⁶⁰27 Harv. Law Rev. 326.

⁶¹Principles of Torts, Preface X

⁶²Non-Contract Law, sec. 411, note 1.

⁶³Leading Principles of Anglo-American Law, sec. 434.

⁶⁴This reminds one of the substance of Mr. Austin's criticism of another term; viz.: that it is merely a sink, into which certain kinds of harm are thrown without discrimination. See 2 Austin, Jur. 3d ed., 945.

⁶⁵Torts, 4th Ed., pp. 209-210.

reality two species of the same generic injury, but different injuries which happen to be called by the same name."

The term nuisance is ambiguous. It has more than one general meaning. Prof. Terry⁶⁶ says: "The word nuisance is used on our law to denote sometimes an act or omission with certain of its consequences, and sometimes a thing. Those acts and omissions which are so-called are wrongs." The thing sometimes called a nuisance "is not necessarily wrongful."

Sir William Erle⁶⁷ says: ". . . the use of the word 'nuisance' in the discussion prolongs the dispute, because it means both annoyance that is actionable, and also that which is not actionable; and where the question is, whether an annoyance is actionable, the word nuisance introduces an equivocation which is fatal to any hope of a clear settlement." ". . . The confusion which pervades the reports" of certain cases ". . . 'is an example . . . of the ill effects of the word 'nuisance' upon the discussion."

From time to time, courts will recognize the existence of new groups, made up of hitherto unnamed torts (torts which hitherto have not been designated by particular names); and names will be invented (suggested) to describe each of these new groups.

What occasion for new groups or new names? Largely, changes in modes of living or of doing business "as the habits of men's life are modified by new inventions, and new cases, produced by such modifications, arise for determination."⁶⁸

Thus, the present controversy as to a Right to Privacy has become specially important by reason of the invention of instantaneous photography; which affords easy and frequent opportunities for interference with such a right, if the right is held to exist. The general attention of the profes-

⁶⁶Leading Principles of Anglo-American Law, s. 434. And see same author in 25 Yale Law Journal, 181.

⁶⁷In appendix to *Brand v. Hammersmith &c. R. Co.*, 1866, L. R. 2 Q. B. 223, 247-8.

⁶⁸See Pollock, *Expansion of the Common Law*, 125.

sion was called to this subject, in 1890, by the article of Messrs. Warren and Brandeis in 4 Harv. Law Rev., 193. Since that time there has been much discussion and various conflicting decisions have been rendered.⁶⁹ The law is still unsettled, and is not to be discussed in the present paper.

In passing, however, we may note a few points. In 1883, Sir J. F. Stephen⁷⁰ suggested that the difference might be met by extending the doctrines hitherto existing under the law of libel. Such extension seems to us impracticable; and it would not cover all the cases now seeking a remedy. The claim is now made that the law should protect a right of privacy which is distinct from a right of reputation.

So the admission is sometimes made that the right of privacy may, in certain cases, be protected as included in the right of property. But this again does not meet *all* claims now made as applications of the alleged right to privacy.

If the existence of a right of privacy, in whole or in part, is conceded, it might be said that we have a ready-made name for the newly recognized tort; *viz.*, Violation of, or Interference with, the Right of Privacy. But there may still be a conflict as to what Large Division or Main Division this Sub-division (this specific class) shall be placed under. Some authorities, which do not concede the full claim, might say: It belongs under the Right of Property. Other authorities which admit the full right claimed, might class it under the Right of Persons. Sir J. F. Stephen might possibly have classed it under Right of Reputation.

These suggestions are given as indicating some of the difficulties of the question; not as affording material for a final settlement.

Here it may be noticed that new inventions and improved methods may lessen the danger of certain conduct (the danger of certain uses of property hitherto regarded as extra-

⁶⁹For a collection of authorities and comments thereon, see 6 Virginia Law Review, 376-377; 5 Cornell Law Quarterly, 177-181; 68 U. of P. Law Review, 284-287; 18 Mich. Law Review, 437-438; 20 Columbia Law Review, 100-101; See also Prof. Plumb, 28 Harvard Law Review, 362-365.

⁷⁰2 History of Criminal Law of England, 385.

hazardous), so far as to remove some cases from the list of instances where the law imposes absolute liability, and instead leave the actor liable only for failure to use care.

Thus, in the case of the old non-dirigible balloon or non-steerable airship, an aviator, whose machine came in contact with the land or with a person on the land, was likely to be held absolutely liable irrespective of fault. But the practical difference between this case and that of the modern dirigible balloon or steerable airship has been pointed out by Pollock.⁷¹ If a more perfected airship should at some future day, become controllable as fully as is now the case with a vessel on the sea or a horse drawing a carriage on the land, it is not impossible that the rigidity of the law may be relaxed, and the aviator who comes in contact with the land may be held liable only in case of failure to use care. The suggestion has been made that the aviator, while not an insurer against accident, may be held under a duty to use "consummate care."⁷²

Not only will names be invented, or suggested, for newly recognized groups of torts; but there will be a revision of some names heretofore given to other groups. Sometimes the former name may be amended; sometimes it may be entirely rejected and a different name substituted. Some names came into use through "premature generalization." Some were based on mistakes as to analogies; where the supposed analogies did not exist at all, or where the weight of analogy was *contra*.⁷³

An instance of a name likely to be entirely rejected is "Slander of Title" (or, to use the broader term, "Slander of Property.") Two of our best legal writers prefer to substi-

⁷¹Torts, 6th ed. 37-38; 10th ed. 38-39.

⁷²See Pollock, Torts, 10th ed. p. 39, note *k*. Compare Judge Baldwin, 9 Mich. Law Rev. 24; Canney v. Rochester Ass'n, 76 N. H. 60 (1911); 1 Wigmore, Cases on Torts, top of p. 62.

⁷³"The treating together of distinct things because they have an unessential similarity cannot tend to the clearness of ideas." N. St. John Green, 6. Am. Law Review, 612.

tute for it "Disparagement of Title" (or "Disparagement of Property").⁷⁴

The name "Slander of Title" seems to have formerly been approved on the supposition that statements affecting a plaintiff's title to property were of the same nature as, or at least were closely analagous to, statements affecting a plaintiff's personal reputation or character. But in reality defamation of reputation⁷⁵ and disparagement of title are distinct torts. In the latter case, the right in the plaintiff which is infringed is not a right to personal reputation, but a right in connection with property; a right to hold property unimpaired in value (free from depreciation in value) by untrue statements concerning the title of the owner. Judges obviously "desire to make it more difficult to maintain an action for disparagement of property than an action for defamation of character. Personal reputation is protected against impairment by language more effectually than interests in property are protected against impairment by such method."

In 13 *Columbia Law Review*, p. 130, the present writer has specifically stated the differences between the rules of law applied to actions for defamation of personal reputation and actions for disparagement of title. The comparisons there made justify the conclusion that disparagement of title is not a mere branch of defamation. Professor Bigelow was right in saying that "slander of title" (as he terms it) has "a place of its own in the law of torts."⁷⁶

⁷⁴Bower, *Code of Actionable Defamation*, p. 242 (2), and note (b); Bohlen, *Select Cases on Torts*, Ed. 1915, Vol. I, p. 873 *et seq.*

"Disparagement' is the term used in most of the later cases, and, for this reason and because it both dissociates the act which constitutes it from acts of defamation proper, and does not suggest either oral or documentary expression as an element in its composition, it is adopted in the text." (Bower, p. 242, note (b)).

"Disparagement' means and includes any publication of matter, the meaning and effect of which is to deny or cast doubt upon the existence or validity of any person's right, claim, title, or interest to, or in, any property, or to depreciate or disparage the merits, utility, qualities, or value of any person's property. . . ." Bower, *Code*, 242 (2).

⁷⁵"Reputation means and includes: in the case of a natural person,—the esteem in which he is held, or the goodwill entertained towards him, or the confidence reposed in him by other persons, . . ." Bower, *Code*, Article 5, p. 3-4.

⁷⁶Bigelow on *Torts*, 7th ed., s. 180. And see 16 *Law Quarterly Review*, 313.

Personally we think that harm and confusion will result from classing Disparagement of Title under what may be called the compromise phrase "Quasi-Defamation." Undoubtedly, there is the very high authority of Mr. Bower for such classification. But see his frank admission as to the difference from "actionable defamation proper."⁷⁷

Great difficulty has been occasioned by the use of names due to theories based on pure fiction. The fictitious nature of the theories is now conceded; and the names are admitted to be incorrect. Is it too late to correct the error, abolish the use of these names, and substitute other names founded upon truth? Some lawyers seem to think that a name admittedly erroneous and founded on pure fiction ought to be retained, unless and until we can suggest a better name. They, perhaps, have in mind the rule that defendant who pleads in abatement must "give the plaintiff a better writ." But we submit that failure to give a particular name may be preferable to adopting an entirely erroneous name.

Better reasons may now be given for some correct results which were formerly reached by the use of fiction. The results thus reached need not be discarded with the fictions; but it does not follow that the fiction phraseology and fiction reasons should be retained.⁷⁸

An instance of an erroneous name, based on pure fiction, is "Constructive Fraud," first used prominently in discussing questions of equity jurisdiction; and later as to actions of tort. This term has been used in cases where there is no

⁷⁷See Bower, *Code of Actionable Defamation*, p. 234, note 1, and pp. 240-241.

As to how the term "slander" came to be used in this connection, and as to the various meanings, which have heretofore been attached to the word, see Bower, *Code of Actionable Defamation*, p. 267-270.

⁷⁸See Prof. Williston, 24 *Harv. Law Rev.* p. 434. See also 27 *Yale Law Journal*, p. 153, notes 38 and 39.

As to the expediency of making changes in existing classifications or in legal nomenclature; see 30 *Harv. Law Rev.*, 418-421; and compare 30 *Harv. Law Rev.* 241-242. As to the expediency, at the present time, of entirely abandoning the use of fiction in law; of entirely discarding the use of fiction phrases and fiction reasons; see 27 *Yale Law Journal*, 151-155.

tinge of actual fraud. The title covers more than 160 pages in the first edition of Story on Equity Jurisprudence, published in 1835.

Judge Story, at the beginning of his long chapter on Constructive Fraud, has sometimes been regarded as almost apologizing for doctrines which (as he says) "may seem to be of an artificial if not of an arbitrary, character."⁷⁹ But Mr. Bower has recently said that the apology should have been made, "not for the doctrines, which are admirable, but for the nomenclature, which is vile. . . . The 'arbitrariness' is in describing these acts by a name in popular use to which they do not answer . . . instead of simply laying down that certain acts and omissions are prohibited, irrespective of fraud or honesty, on the ground of the tendency and temptation to evil which would otherwise result."⁸⁰

The objections to the term "Constructive Fraud" (including the confusion resulting from its use) have been strongly stated by authorities entitled to great respect.⁸¹

⁷⁹1 Story, Eq. Juris. 1st ed., s. 258.

⁸⁰Bower, Actionable Misrepresentation, App. s. 455, p. 387. Compare Pollock, Law of Fraud in British India, 15, 16, 41, 42.

⁸¹See, for example, Lord Romilly, M. R., *In re Agriculturists' Cattle Ins. Co.*, 1867, L. R. Eq. 769, 771-772; and Ewart on Estoppel, 160, 232, 286, 259-261, 87, 98. The reasonable conclusion is that the term should be dropped from the law. The high authority of Mr. Pomeroy is opposed to this conclusion, although that very able writer recognizes the objections to the term. See 2 Pomeroy, Eq. Juris., Ed. 1881-1882, s. 874, note 2; and see also s. 922.

See further, as to this term, article by present writer, 27 Yale Law Journal, 319-322.

As to the use of such expressions as "Constructive Fraud," see the elaborate essay in Appendix A, in Bower on Actionable Misrepresentation, sec. 445-sec. 477. The learned author speaks of the "discrepancy between the artificial nomenclature of the courts and the ordinary sense of the community" (s. 459); and regrets the use of "fraud" by the courts in any sense other than the popular meaning of dishonesty. "Hence it is," he says, "that judges have been compelled to discriminate, with painful precision, between 'constructive,' 'legal,' 'technical,' 'artificial,' 'unconscious,' or 'equitable' fraud on the one hand, and fraud in its normal and natural and ordinary sense, variously described as 'actual,' 'positive,' 'personal,' 'moral,' 'intentional,' 'conscious,' or 'in the offensive sense,' on the other; as if fraud could ever be described as other than actual, positive, personal, moral, intentional, conscious, or could be used in any but an offensive sense, except for the purpose of the antithesis necessitated by the initial mistake in scientific terminology." Section 457.

In secs. 461 and 462, the author calls attention to the importance of terminology:

"The importance of terminology in any department of knowledge which ranks as a science, above all in such a science as jurisprudence, one would suppose to be manifest. And yet, in nearly every branch of English law, precision

Views which, until recently, prevailed as to the law of procedure (the law of remedies), have given rise to the frequent employment of fictions. In modern times, until the very recent statutory changes in the law as to forms of action, it was commonly assumed that (apart from suits to obtain possession of specific articles of property) there were only two great divisions of causes of personal action; *viz.*, contract and tort; and that there could be no cause of personal action unless it could be classed under one of these two heads.⁸²

At the present time we think it should be recognized that there are three great divisions of causes of personal action:

1. Breach of genuine contract.
2. Tort, in the sense of fault.
3. So-called 'Absolute Liability' imposed by courts, where there is neither breach of genuine contract nor fault. Under this classification the application of the term 'tort' should be restricted to class 2.⁸³

The third class (cases of "absolute liability") is made up mainly of two sets of subjects:

Sub-division (*a*): Cases where recovery has heretofore been enforced in an action of contract; but where there is in fact no real contract; only a fiction contract.⁸⁴

and lucidity in nomenclature, as well as in classification and formal expression generally, has been either openly professed to be, or in practice treated as, a thing of no account, or, at any rate, of quite subsidiary interest." It is, he says, an old fallacy "that things and thoughts are the realities, and that names do not matter. The truth is that terminology reacts on thought. Loose definitions, encourage loose conceptions. Words, maxims, aphorisms, phrases, which are good servants, but bad masters, have a tendency to dominate ideas, and, when once this perverted and unnatural sovereignty is established, there is danger of a Saturnalian orgy in which Mind, the Master, will wait upon Language, the Slave." He adds: "The violation of the first law of scientific terminology, *viz.* that each term should express a distinct concept, and one only, and should always be used in one and the same sense, has been conspicuously violated in the judicial maltreatment of that unhappy expression 'fraud'."

As to the importance of correcting "Defects in Terminology," see fuller discussion in Bower's Code of the Law of Actionable Defamation, Appendix XXI, section 2, p. 487-489.

⁸²See 30 Harv. Law Rev. 242; 27 Yale Law Journal, 325.

⁸³See 30 Harv. Law Review, 243.

⁸⁴See 30 Harv. Law Rev., 243, 425-6.

Sub-division (b): Cases where recovery has heretofore been enforced in an action of tort; but where there is in fact no actual fault on the part of the defendant.

Sub-division (a), which is generally treated of in this country under the name Quasi-Contract, is not concerned with the subject of this paper so much as Sub-division (b). But, in passing, three points as to Quasi-Contracts are mentioned in the note below.⁸⁵

As to Sub-division (b), under Absolute Liability. If the law recognizes (under the name of Absolute Liability) a third division of causes of personal action, distinct from contract and from tort in the sense of fault, a considerable number of cases heretofore classed under tort will fall under this third division. In 30 Harv. Law. Rev. 319-332, the present writer has attempted to enumerate some cases which would then cease to be classed under tort. In various instances it is hard to draw the line. There are cases where there is conflict as to when to apply the doctrine of extra-hazardous peril, where liability is imposed in the absence of fault.⁸⁶ And there is a growing tendency to extend the scope of negligence; and to base liability on the existence of that fault instead of holding that the case is one of absolute liability.⁸⁷ But, at all events, *some* cases will be transferred

⁸⁵1. In the cases grouped under this head, there is no genuine agreement, and the "contract" heretofore alleged in the declaration is a pure fiction. See Keener on Quasi-Contract, pp. 5, 14, 15; Woodward on Quasi-Contract, s. 4; Maine, Ancient Law, 3d Am. Ed., 332; Ames, Lectures on Legal History, 160; Judge Swayze, 25 Yale Law Journal, 4.

2. Terry says that there is now no sufficient reason for persisting in the use of this fiction; and he prefers that non-contractual obligations be frankly recognized as such. Leading Principles of Anglo-American Law, s. 483; 17 Columbia Law Review, 378. And in this view, Salmond substantially concurs. Jurisprudence, Ed., 1902, p. 564.

3. The term Quasi-Contract is unsatisfactory to several jurists. See Sir F. Pollock, 22 Law Quarterly Review, p. 89; Prof. Corbin, 21 Yale Law Journal, p. 544. "The name itself has a makeshift air, and is on the face of it a confession of juristic failure." (From 10 Law Qu. Rev. 85; in notice of Keener on Quasi Contract, signed W. R. A., presumably Sir W. R. Anson). "The qualifying word *quasi* is too frequently used when one is without an idea and wishes to say something, or has an idea but does not know how to express it." Prof. Knowlton, 9 Mich. Law Rev. 671.

⁸⁶See 30 Harv. Law Rev. 409-413.

⁸⁷See 30 Harv. Law Review, 413-417; also 33 Harv. Law Rev. 553, 555, 672, 676, 677, 682, 683-684.

from the general class of torts to that of absolute liability. And among the cases thus transferred, there will be included various cases which would formerly have been spoken of as "torts without particular names."

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